

The Board has considered the record and adopted the stipulations listed in the Award.

### ISSUES

The ALJ concluded that the claimant suffered a compensable series of accidental injuries culminating in an accident on November 18, 2008 for which he gave timely notice.<sup>1</sup> The ALJ awarded the claimant a 22.5 percent functional impairment to the body as a whole which reflects an average of the two ratings offered by the testifying physicians, Drs. Murati and Gilbert, both of which were rendered pursuant to the *Guides*.<sup>2</sup> Claimant's request for "additional medical expense" was denied for insufficient evidence.<sup>3</sup> Likewise, respondent's request for a credit pursuant to K.S.A. 44-501(c) against claimant's permanency was denied based upon "inadequate proof."<sup>4</sup>

Respondent argues the claimant failed to establish that he suffered any personal injury by accident and therefore is not entitled a permanent impairment. Simply put, respondent asserts that claimant is suffering from a slow deterioration of his spine "which may or may not have been made more symptomatic by his labors."<sup>5</sup> Respondent goes on to argue that claimant's ongoing symptoms do not constitute an injury as that term is defined by K.S.A. 44-508(e). Although timely notice is mentioned in the Application for Review, Respondent's appeal brief<sup>6</sup> makes no mention of the lack of timeliness of notice based upon K.S.A. 44-520. And while respondent generally references the claimant's purported varying dates of injury it does not advocate for any particular date of accident. Respondent only contends claimant has been inconsistent about his attribution of the source and time of the onset of his symptoms and therefore, the contention that he sustained injury cannot be believed.

Alternatively, even if claimant is found to have a compensable accident, respondent maintains that Dr. Murati's opinions are nothing more than the result of a blind attribution by a physician based upon the bare assertions of the claimant's lawyer and should therefore be summarily disregarded in favor of those opined by Dr. Gilbert.<sup>7</sup> Thus, respondent suggests at best, claimant has sustained a 10 percent impairment as a result of his work activities.

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<sup>1</sup> This is the date that Dr. Michael Smith took claimant off work in preparation for surgery.

<sup>2</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4<sup>th</sup> ed.).

<sup>3</sup> ALJ Award (May 26, 2010) at 3.

<sup>4</sup> *Id.*

<sup>5</sup> Respondent's Brief to the ALJ at 3 (filed May 20, 2010)(filed with the Board on July 6, 2010).

<sup>6</sup> Respondent filed no brief with the Board and instead, adopted its brief presented to the ALJ.

<sup>7</sup> "Not surprisingly, Dr. Murati attributed the claimant's problems to his work. What is surprising, however, is that he did so so slavishly." Respondent's Brief to the ALJ at 3 (filed May 20, 2010)(filed with the Board on July 6, 2010).

Claimant, on the other hand, maintains the ALJ's decision should be affirmed in all respects.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs, the Board makes the following findings of fact and conclusions of law:

The ALJ's recitation of the facts and circumstances surrounding claimant's series of accidental injuries is accurate and is hereby adopted herein. Suffice it to say, claimant was employed in a position as a general maintenance electrician that required him to repetitively lift, pull and bend while in the ordinary scope of his employment. In June 2008, his job involved replacing electrical conduit and light fixtures for large poles on respondent's property.

In that same month claimant began to notice pain and cramping in his legs at the end of his work days. He sought treatment with his personal physician, Dr. Karen Bruce, who believed him to be suffering from a circulatory problem. When testing failed to confirm her suspicion, claimant was referred to an orthopaedist for further evaluation. Claimant had an MRI on July 7, 2008 and that test revealed degenerative disc disease, most particularly at the L5-S1 levels.

Claimant reported his test results to his supervisor, Rick Blue, and further advised him that "...my back -- that L5-S1 was completely destroyed" . . . "I told him it was them light poles" referring to the activities in June 2008.<sup>8</sup> Claimant continued working his regular duties until October 31, 2008 when he could no longer continue. By that time, claimant testified that he was unable to walk farther than 50 feet at a time and often had to lay down while working, pulling the cables as required while horizontal on the ground. Claimant indicated that his symptoms had continued to worsen as he was working from 2007 through October 31, 2008, his last date of work.<sup>9</sup>

On that last date of work claimant told his supervisor, Mr. Blue, that he could not continue. Mr. Blue referred claimant to Dianne Waggoner, the human resources manager, who helped him complete a report of accident and referred him to Dr. Donald Mead. Claimant followed through with this referral and according to him, Dr. Mead recommended that he keep his appointment with Dr. Michael Smith, the orthopaedic surgeon. Dr. Smith diagnosed "[l]umbar spondylosis with radicular changes"<sup>10</sup> and performed surgery on

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<sup>8</sup> R.H. Trans. at 11.

<sup>9</sup> Claimant's E-1 claims a date of accident occurring over a series of dates ending on October 31, 2008, his last date of work.

<sup>10</sup> Murati Depo., Ex. 2 at 2 (Aug. 25, 2009 report).

November 24, 2008. Dr. Smith performed a right iliac crest bone graft, laminotomy, foraminotomy, discectomy at L5-S1, a fusion with hardware including an interbody cage placement at L5-S1. Claimant returned to work in April 2009 performing the same job, but with some self-limitation.<sup>11</sup>

Two physicians have weighed in on claimant's condition, his impairment and its connection to his work activities. Although respondent suggests that claimant has failed to establish an "injury" as that term is defined within the Kansas Workers Compensation Act ("Act"), this argument is unpersuasive given these facts and circumstances.

Claimant testified that the source of his injury was his ongoing work activities, particularly those that occurred in June 2008 and continued for a period of months. Even after he began to notice pain and cramping, he continued to work his normal work duties and his capacity to continue became severely limited. On October 31, 2008, he was no longer able to continue. He denies telling any physician his symptoms date back 2 years (well before June 2008). The history contained within both testifying physicians' reports is consistent with his testimony at the regular hearing.

Dr. Murati, who examined claimant at his own attorney's request, testified that claimant's repetitive work activities gave rise to his low back condition. And Dr. Gilbert, the physician respondent retained to examine and rate claimant, did not indicate claimant's condition was attributable to anything other than a preexisting condition and claimant's ongoing work activities. Diane Waggoner confirms the claimant's recitation of the onset of his symptoms (beginning in June 2008) and worsening over time until he could work no longer as of October 31, 2008.

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.<sup>12</sup> A claimant must establish that his personal injury was caused by an "accident arising out of and in the course of employment."<sup>13</sup> The phrase "arising out of" employment requires some causal connection between the injury and the employment.<sup>14</sup> The existence, nature and extent of the disability of an injured workman is a question of fact.<sup>15</sup> A workers compensation claimant's testimony alone is sufficient evidence of the claimant's physical

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<sup>11</sup> Claimant is not requesting work disability at this time.

<sup>12</sup> K.S.A. 44-501(a); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

<sup>13</sup> K.S.A. 44-501(a).

<sup>14</sup> *Pinkston v. Rice Motor Co.*, 180 Kan. 295, 303 P.2d 197 (1956).

<sup>15</sup> *Armstrong v. City of Wichita*, 21 Kan. App. 2d 750, 907 P.2d 923 (1995).

condition.<sup>16</sup> The finder of fact is free to consider all the evidence and decide for itself the percent of disability the claimant suffers.<sup>17</sup>

After considering the entire record, the Board concludes that claimant has established that he suffered a series of injuries while in respondent's employ. The nature of his job activities was such that he sustained injury each and every day rather than in a single acute injury. These activities came to take their toll and caused his low back and leg symptoms to emerge beginning in June 2008 when claimant was involved in the installation of light poles. Claimant's description of his job duties, particularly those in the summer of 2008 when his complaints began to manifest, are unchallenged in this record. Accordingly, the Board affirms the ALJ's finding that claimant sustained a series of injuries while in respondent's employ.

Having determined that he sustained a series of repetitive injuries, the Board must then consider the claimant's date of accident and whether timely notice was provided as required by K.S.A. 44-520. K.S.A. 44-508(d) was amended by the Kansas legislature effective July 1, 2005. The definition of accident has been modified, with the date of accident in microtrauma cases being now defined by statute rather than by case law. The new date of accident determination is as follows:

(d) 'Accident' means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. **In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date**

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<sup>16</sup> *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

<sup>17</sup> *Carter v. Koch Engineering*, 12 Kan. App. 2d 74, 76, 735 P.2d 247, *rev. denied* 241 Kan. 838 (1987).

**of accident be the date of, or the day before the regular hearing.** Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.<sup>18</sup> (Emphasis added.)

The ALJ concluded claimant's legal date of accident was November 18, 2008, the date claimant was taken off work by Dr. Smith in preparation for surgery. The Board finds this determination should be affirmed. Claimant contacted Diane Wagonner on November 6, 2008 and told her of his back condition and its connection to his work activities. She referred him to Dr. Mead for examination and treatment. According to claimant, Dr. Mead recommended that claimant follow through with his previously scheduled appointment with Dr. Michael Smith, an orthopaedist. Dr. Smith took claimant off work on November 18, 2008 and surgery followed on November 28, 2008. Based upon these uncontroverted facts, it appears that Dr. Smith was an authorized medical provider, and under the provisions of the statute, November 18, 2008 is claimant's legal date of accident. Thus, the ALJ's finding as to date of accident is affirmed.

As noted by the ALJ, claimant's notice to respondent of his work-related injury was timely under K.S.A. 44-520. Claimant not only informed his supervisor sometime in June 2008, he also informed Diane Wagonner, the person in charge of workers compensation proceedings for respondent, on November 8, 2008. The two of them completed an accident form and he was referred for treatment at that point. Although the notification occurred in advance of the legal date of accident, that does not invalidate the notice.

Turning now to the ultimate impairment issue, the ALJ averaged the two opinions offered by each of the physicians and refused to give respondent any credit for any preexisting impairment as he concluded respondent had failed to sufficiently prove a preexisting condition with a ratable impairment as required by law.<sup>19</sup> He therefore awarded claimant a 22.5 percent impairment. After considering the entirety of the record, the Board finds the ALJ's approach to be reasonable and is hereby affirmed. Dr. Murati rated claimant's low back condition at 20 percent while Dr. Gilbert rated claimant at 25 percent. Both physicians diagnosed claimant's degenerative disc disease, his resulting disc problems at L5-S1 and the surgery he required to fuse that area of his spine in order to maintain structural stability. Although they assigned different ratings as a result of this condition, neither of these opinions was any more persuasive than the other.

And the ALJ was correct in his conclusion that respondent failed to sufficiently prove claimant had a preexisting impairment. It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an

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<sup>18</sup> K.S.A. 2005 Supp. 44-508(d).

<sup>19</sup> The burden of proving a workers compensation claimant's amount of preexisting impairment as a deduction from total impairment belongs to the employer and/or its carrier once the claimant has come forward with evidence of aggravation or acceleration of a preexisting condition. ALJ Award (May 26, 2010) at 3.

existing disease or intensifies the affliction.<sup>20</sup> The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.<sup>21</sup>

Respondent's expert, Dr. Gilbert, provided no explanation of how he came to the opinion that 5 percent of claimant's impairment was preexisting. In fact, Dr. Gilbert admitted that he had only part of Dr. Smith's records and he had absolutely no records to show that claimant had problems with his low back before the accident that is the focus of this claim. Dr. Gilbert's opinion is nothing more than speculation and does not meet the standard necessary for purposes of establishing a preexisting impairment under K.S.A. 44-501(c) as set forth in *Hanson*. Accordingly, the ALJ's determination that respondent failed to meet its burden of proof and decision to deny respondent any credit under K.S.A. 44-501(c) are affirmed.

Finally, at the regular hearing the claimant made an issue of "additional medical treatment" but provided no documentation or explanation on this issue. The ALJ declined to award any such reimbursement based upon an insufficiency of evidence and the Board concurs with that analysis. The Board does, however, modify the Award and enters an order directing respondent to pay for all reasonable and related medical expenses associated with this claim, subject to the statutory fee schedule, and grants claimant future medical benefits for his work-related injury upon proper application.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated May 26, 2010, is affirmed in part and modified in part as follows:

Claimant is granted an award for all reasonable and related medical expenses associated with this claim, subject to the statutory fee schedule, and future medical benefits for his work-related injury upon proper application.

The record contains a fee agreement between claimant and his attorney, however, the Board notes that the ALJ did not award claimant's counsel a fee for his services. K.S.A. 44-536(b) requires that the Director review such fee agreements and approve such contract and fees in accordance with that statute. Should claimant's counsel desire a fee be approved in this matter, he must submit his contract with claimant to the ALJ for approval.

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<sup>20</sup> *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984); *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

<sup>21</sup> *Hanson v. Logan U.S.D.* 326, 28 Kan. App.2d 92, 11 P.3d 1184, rev. denied 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App.2d 510, 949 P.2d 1149 (1997).

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of August 2010.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Jeffery K. Cooper, Attorney for Claimant  
Bryce D. Benedict, Attorney for Respondent and its Insurance Carrier  
Brad E. Avery, Administrative Law Judge